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BEFORE THE ARIZONA CORPORATION COMMISSION

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PAC-WEST TELECOMM, INC.,

Complainant,

QWEST CORPORATION,

Respondent.

) DOCKET NOS. T-01051B-05-0495

) T-03693A-05-0495

) MOTION FOR SUMMARY

) DETERMINATION OF

) PAC-WEST TELECOMM, INC.

Pursuant to the procedural order dated January 21, 2009, Pac-West Telecomm, Inc. ("Pac-West") files the following Motion for Summary Determination of its formal complaint for enforcement of its interconnection agreement with Qwest Corporation ("Qwest").

SUMMARY

The Qwest/Pac-West ISP Amendment states that section 251(b)(5) traffic will be compensated at the rate applied to ISP traffic (.0007 cents per minute). The FCC recently announced that ISP-bound traffic falls within the scope of section 251(b)(5) traffic. The FCC's most recent order makes perfectly clear that application of the rate

set for ISP-bound traffic is not limited geographically to calls within a particular calling area.<sup>1</sup> Qwest's contention that VNXX traffic is section 251(g) traffic is not supported by any FCC Order. The VNXX traffic at issue in this case is ISP-bound traffic and ISP-bound traffic is section 251(b)(5) traffic. Thus, the VNXX traffic at issue in this matter is section 251(b)(5) traffic and subject to reciprocal compensation under the parties' ISP Amendment.

## **BACKGROUND**

On July 13, 2005, Pac-West filed a formal complaint with the Arizona Corporation Commission ("Commission"), seeking an order compelling Qwest to pay Pac-West for all locally dialed ISP-bound traffic, as required by the parties' Interconnection Agreement ("ICA"). Pac-West and Qwest had entered into an amendment to their existing ICA (the "*ISP Amendment*") on May 24, 2002.<sup>2</sup> This amendment was filed with the Commission and became effective by operation of law on May 19, 2003 (Decision No. 66052). Qwest refused payment arguing that Pac-West was not entitled to compensation for locally dialed calls delivered to a modem outside the telephone exchange where the call had originated. For purposes of this case, this traffic is known as "VNXX traffic."

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<sup>1</sup> *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. November 5, 2008) ("*ISP Mandamus Order*").

<sup>2</sup> Internet Service Provider ("ISP") Bound Traffic Amendment to the Interconnection Agreement between Qwest Corporation and Pac-West Telecom, Inc. for the State of Arizona (dated May 24, 2002) (The ISP Amendment is attached to the Formal Complaint to Enforce Interconnection Agreement (Docket Nos. T-01051B-05-0495 and T-03693A-05-0495 and attached here as Exhibit 1).

On June 29, 2006, the Commission issued Decision No. 68820 (“Decision”) requiring Qwest to pay reciprocal compensation to Pac-West for all ISP-bound traffic, including VNXX traffic.<sup>3</sup> In the Decision, the Commission concluded that the “plain language of the ISP Amendment provides for reciprocal compensation for all ISP-bound traffic. Because it does not exclude VNXX ISP-bound traffic, we find that such traffic should be subject to reciprocal compensation under the terms of the ICA and ISP Amendment.”<sup>4</sup> Qwest paid the amount due Pac-West under the Decision and sought review of the Decision in federal district court.

In its appeal to the district court, Qwest challenged Decision No. 68820, asserting that the calls in question were “non-local ISP traffic” or “long distance calls” and therefore not compensable.<sup>5</sup> Qwest further alleged that the Commission violated section 251(g) of the Telecommunications Act of 1996<sup>6</sup> by applying the compensation regime applicable to telecommunications traffic instead of the access charge regime which governs long distance calls under section 251(g).<sup>7</sup> According to Qwest, the traffic in question was section 215(g) traffic and compensable as 251(g) traffic. In response, Pac-West argued that the parties’ ICA required Qwest to pay Pac-West the FCC ordered rate

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<sup>3</sup> *In the Matter of Pac-West Telecom, Inc. vs. Qwest Corporation*, Docket Nos. T-01051B-05-0495 and T-03693A-05-0495, (June 29, 2006), Decision No 28820.

<sup>4</sup> Decision ¶ 26.

<sup>5</sup> Qwest Complaint ¶¶ 41, 44, 53 and 54.

<sup>6</sup> 47 U.S.C. § 151 *et seq.* (“Telecommunications Act” or “the Act”).

<sup>7</sup> Qwest Complaint ¶¶ 38 and 41.

for all 251(b)(5) traffic, with no qualifications, and that under the Act, the VNXX traffic was “telecommunications” traffic subject to section 251(b)(5) of the Act and thus subject to compensation under the parties’ ICA and the ISP Amendment.<sup>8</sup>

On March 6, 2008, the district court issued its order reversing the Decision and remanding the case to the Commission for a determination of whether “VNXX traffic was among the calls subject to such reciprocal payments” before the issuance of the *ISP Remand Order*.<sup>9</sup> In its order, the district court mistakenly presumed that “[t]he reciprocal compensation provisions of section 251(b)(5) apply solely to calls that originate and terminate in the same local calling area.”<sup>10</sup> This incorrect starting point led to the equally faulty conclusion that “[t]he ACC may find that VNXX is local” and thus covered by reciprocal compensation or that it “is not now, [n]or . . . ever was, local traffic” and is therefore subject to access charges.<sup>11</sup>

When the district court entered its order in March 2008, the FCC’s position on the correct categorization of ISP-bound traffic could have been correctly derived by reading and harmonizing the FCC *ISP Remand Order* and the opinion of the D.C. Circuit Court

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<sup>8</sup> 47 U.S.C. § 251 (b)(5).

<sup>9</sup> Order at 20.

<sup>10</sup> Order at 12 (The District Court relied upon certain quotations in *Verizon v. Peevey*, 462 F.3d 1142, 1146 (9<sup>th</sup> Cir. 2006) from the 1996 *Local Competition Order*, 11 FCC Rcd at 16013, ¶¶1033, 1034 (the “*Local Competition Order*”) regarding “local” calls. However, “local” call analysis in the *Local Competition Order* was subsequently rejected by the FCC in the *ISP Remand Order* and the *ISP Second Remand Order*.)

<sup>11</sup> Order at 20-23.

of Appeals in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (“*WorldCom*”).

However, the state of the law was admittedly muddled by the FCC’s failure, at that time, to respond to the D.C. Circuit Court of Appeals’ directive that a rationale be given for the ISP traffic compensation plan. All parties to this dispute were aware that by November 5, 2008, the FCC would issue a new order on ISP-bound traffic in response to a mandamus order from the D.C. Circuit Court of Appeals.<sup>12</sup> The FCC issued that order and, as expected, it bears directly on the Commission’s resolution of this case.<sup>13</sup>

## ARGUMENT

### A. ISP-bound Traffic is Section 251(b)(5) Traffic.

The central question presented to the Commission in this case was “Whether VNXX ISP-Bound traffic is eligible for reciprocal compensation under the [Pac-West] ICA, the ISP Amendment, and the *ISP Remand Order*.”<sup>14</sup> Importantly, this case does not touch on larger generic questions about VNXX compensation in Arizona generally. Rather, the parties executed an agreement governing intercarrier compensation and this proceeding only concerns the enforcement of that agreement. The signed “rate election” found in the ISP Amendment provided that “the reciprocal compensation rate elected for

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<sup>12</sup> *In re Core Communications, Inc.*, No. 07-1446, 2008 WL 2649636, at \*1, \*11 (D.C. Cir. July 8, 2008).

<sup>13</sup> *ISP Mandamus Order* ¶¶ 8 and 16.

<sup>14</sup> Order at 8.

(251(b)(5)) traffic is . . . The rate applied to ISP traffic.”<sup>15</sup> The ISP Amendment also provided that “Qwest elects to exchange ISP-Bound traffic at the FCC ordered rates pursuant to the [*ISP Remand Order*].”<sup>16</sup> The parties to this dispute have at all times agreed that the traffic at issue in this case is ISP-bound traffic.<sup>17</sup> Under each of these provisions, the outcome is the same: the traffic in question is section 251(b)(5) traffic subject to the rate applied to ISP traffic, and the traffic is ISP-bound traffic to be exchanged at the FCC *ISP Remand Order* rates.

The district court, looking exclusively at section 3 of the ISP Amendment, held that it “could not conclude that the FCC intended to include VNXX traffic within the definition of the term ‘ISP-bound traffic’ in the *ISP Remand Order*” and remanded the case for a determination of whether “VNXX traffic was among the calls subject to such reciprocal payments” before the issuance of the *ISP Remand Order*.<sup>18</sup> As discussed below, a number of the district court’s underlying presumptions regarding the nature of 251(b)(5) traffic would be, within a year, unequivocally rejected by the FCC.

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<sup>15</sup> Internet Service Provider (ISP) Bound Traffic Amendment to the Interconnection Agreement between Qwest Corporation and Pac-West Telecom, Inc. for the State of Arizona, p. 3, section 5 (dated May 24, 2002 with rate election effective as of June 14, 2001) (“*ISP Amendment*”) (Attached as Exhibit 1).

<sup>16</sup> ISP Amendment p. 2, section 3.

<sup>17</sup> Qwest Complaint ¶¶ 3, 41, 44, 53 and 54 (referencing “calls placed to ISPs” and “ISP traffic”).

<sup>18</sup> Order at 20.

Eight months after the district court issued its order, the FCC released its order justifying the intercarrier compensation scheme for ISP-bound traffic.<sup>19</sup> The *ISP Mandamus Order*, like prior FCC orders, has the full force and effect of federal law and must be followed by the Commission. *See AT&T Commc'ns, Inc. v. Qwest Corp.*, No. 206CV00783 DS, 2007 WL 518537, \*4 n.5 (D. Utah Feb. 13, 2007) (“As Qwest observes, [the Tenth Circuit] recognized the primacy of federal law, even where there is a role for state law: ‘The [state corporation commission] has an obligation to interpret the Agreement within the bounds of existing federal law.’”); *see also Sw. Bell Tel. Co. v. Brooks Fiber Commc'ns of Okla., Inc.*, 235 F.3d 493, 499 (10<sup>th</sup> Cir. 2000); *Sw. Bell Tel. Co. v. Pub. Util. Comm'n of Tex.*, 208 F.3d 475, 482 (5<sup>th</sup> Cir. 2000); *AT&T Commc'ns of Cal., Inc. v. Pac. Bell*, No. C 97-0080 SI, 1998 WL 246652, \*14 (N.D. Cal. May 11, 1998) (“The FCC is empowered to announce its ruling by order rather than codified regulation, and its orders have full force and effect of law.”), *aff'd*, 203 F.3d 1183 (9<sup>th</sup> Cir. 2000).

The *ISP Mandamus Order* expressly states that section 251(b)(5) is not limited to “local” traffic and that all ISP-bound traffic falls within the scope of section 251(b)(5).<sup>20</sup> As the FCC explained in the *ISP Mandamus Order*, section 251(b)(5) is the overarching

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<sup>19</sup> *ISP Mandamus Order*.

<sup>20</sup> *ISP Mandamus Order* ¶¶ 8 and 16. Carriers remain able, as a contractual matter, to agree upon intercarrier compensation arrangements governed by tariff – arrangements that differ from the .0007 FCC cost recovery mechanism found in the *ISP Remand Order*. That, however, was not the path taken by Qwest and Pac-West.

compensation obligation applicable to all telecommunications including ISP-bound traffic:

8. We begin by looking at the text of the statute. Section 251(b)(5) imposes on all LECs the “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” The Act broadly defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” Its scope is not limited geographically (“local,” “intrastate,” or “interstate”) or to particular services (“telephone exchange service,” “telephone toll service,” or “exchange access”). We find that the traffic we elect to bring within this framework fits squarely within the meaning of “telecommunications.” We also observe that had Congress intended to preclude the Commission from bringing certain types of telecommunications traffic within the section 251(b)(5) framework, it could have easily done so by incorporating restrictive terms in section 251(b)(5). Because Congress used the term “telecommunications,” the broadest of the statute’s defined terms, we conclude that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic.<sup>21</sup>

Throughout this litigation, Qwest has argued that compensation between Qwest and Pac-West “is based on the geographic location of the two ends of the call”<sup>22</sup> and that “the FCC’s reciprocal compensation rules continue to apply only to local traffic . . . .”<sup>23</sup> As we now know, these assertions are contrary to what the FCC intended and announced in the *ISP Mandamus Order*: “we conclude that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local

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<sup>21</sup> *Id.* ¶ 8 (footnotes omitted).

<sup>22</sup> Qwest Corporation’s Answer to Pac-West Telecom’s Complaint to Enforce its Interconnection Agreement, and Counterclaims, p. 10 (August 22, 2005).

<sup>23</sup> Qwest Corporation’s Reply Brief p. 14 (March 15, 2007) (“*Qwest Reply*”).



traffic.”<sup>24</sup> As the FCC further explained, compensation obligations between carriers under section 251(b)(5) are not limited geographically, or to particular services.<sup>25</sup>

Qwest also argued to the district court that Pac-West “ignor[ed] the FCC’s determination that ISP-bound traffic is not subject to reciprocal compensation under Section 251(b)(5) of the Act.”<sup>26</sup> Qwest’s primary argument – that ISP-bound traffic cannot be subject to reciprocal compensation under section 215(b)(5) – was also squarely rejected by the FCC in the *ISP Mandamus Order*. Indeed, the *ISP Mandamus Order* is fatal to Qwest’s contention that compensation cannot be paid because ISP-bound traffic and section 251(b) traffic are distinct traffic types. The following excerpt from the Qwest Reply submitted to the district court aptly illustrates the disparity between Qwest’s argument and the FCC *ISP Mandamus Order*:

The Commission and Pac-West further argue that the Pac-West [ISP Amendment] does not expressly exclude VNXX traffic. This argument erroneously presupposes that VNXX traffic was included in the first instance. Since the scope of traffic compensable by the ISP Amendments is tied to what is compensable under the *ISP Remand Order*, their argument is really just the argument refuted above that the *ISP Remand Order* prescribed intercarrier compensation for all ISP Traffic including calls delivered to an ISP located outside the caller’s LCA. Since the *ISP Remand Order* does not require compensation for calls outside the caller’s LCA, neither do the ISP Amendments.<sup>27</sup>

Qwest’s underlying presumption – that the “ISP Remand Order does not require compensations for calls outside the caller’s ICA” – fails. The FCC announced

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<sup>24</sup> *ISP Mandamus Order* ¶ 8.

<sup>25</sup> *Id.*

<sup>26</sup> Qwest Reply p. 25.

<sup>27</sup> Qwest Reply p. 25.

unequivocally in the *ISP Mandamus Order* that the reciprocal compensation obligations in section 251(b)(5) apply not just to “local” traffic but to all telecommunications traffic exchanged between local exchange carriers (“LECs”), unless excluded by section 251(g).<sup>28</sup>

The *ISP Mandamus Order* includes the following sentence (a conclusion that what was only implied by the *ISP Remand Order*): “As a result, we find that ISP-bound traffic falls within the scope of section 251(b)(5).”<sup>29</sup> Pac-West and Level 3 asserted repeatedly during this litigation that ISP-bound traffic falls within the scope of section 251(b)(5).<sup>30</sup> Until now, however, that argument was not easily supported by citation to an FCC Order. Now it is. ISP-bound traffic is section 251(b)(5) traffic. The traffic at issue in the ISP Amendment to the parties’ ICA was ISP-bound traffic.<sup>31</sup> Pursuant to the FCC Order, ISP-bound traffic is section 251(b)(5) traffic – no matter where it travels. In this case, the ISP Amendment directs a specific level of compensation for section 251(b)(5) traffic and Pac-West is entitled to that compensation.<sup>32</sup>

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<sup>28</sup> *ISP Mandamus Order* ¶¶ 9-16.

<sup>29</sup> *ISP Mandamus Order* ¶ 16.

<sup>30</sup> See Pac-West Opening Brief of Pac-West Telecom, pp. 12-15 (January 31, 2007) (Arizona District Court No. CV 06-02130-PHX-SRB); Reply Brief of Pac-West Telecom, pp. 19-20 (3-15-07) (Arizona Dist. Court No. CV 06-02130-PHX-SRB); Response Brief in Support of Formal Complaint to Enforce Interconnection Agreement, pp 12-15 (Docket Nos. T-01051B-05-0495; T-03693A-05-0495) (October 19, 2005).

<sup>31</sup> Qwest Complaint ¶¶ 3, 41, 44, 53 and 54 (“calls placed to ISPs”).

<sup>32</sup> This conclusion has no bearing on the Commission’s generic proceeding concerning VNXX traffic or on an independent interconnection arrangement between two

**B. VNXX Traffic is Not Excluded from Section 251(b) by Section 251(g).**

In the *ISP Mandamus Order*, the FCC reiterated that “the scope of section 251(b)(5) is limited only by section 251(g), which temporarily grandfathered the pre-1996 Act rules governing ‘exchange access, information access, and exchange services for such access’ provided to interexchange carriers and information service providers until ‘explicitly superseded by regulations prescribed by the Commission.’”<sup>33</sup> In other words, the *only* compensation scheme that exists apart from section 251(b)(5) is the section 251(g) compensation mechanism.<sup>34</sup> If – as Pac-West contends – this is section 251(b)(5) traffic, then it is compensable under the ISP Amendment. To prevail as a matter of law in this case, Qwest can only argue that this ISP-bound traffic is section 251(g) traffic. However, that argument has been rejected both by the D.C. Circuit Court of Appeals in *WorldCom* and by the FCC.

**1. *WorldCom, Inc. v. F.C.C.***

In 2002, the D.C. Circuit Court of Appeals held unambiguously that section 251(g) *does not apply* to ISP-bound traffic exchanged between LECs – and thus that calls made to an ISP are not toll calls even if they leave the local calling area. *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 432 (D.C. 2002). This holding was based upon the understanding that both prior to and following passage of the Act, Qwest [or

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carriers for compensation at a different rate. This case concerns only this particular contract.

<sup>33</sup> *ISP Mandamus Order*, ¶ 9 (footnote omitted).

<sup>34</sup> Attached as Exhibit 2 is the illustrative exhibit used on this point by Pac-West before the Commission and before the district court.

WorldCom?] exchanged such traffic with other LECs as local, not toll, traffic, without regard to the physical location of either of the parties to the call. The pre-Act treatment of this traffic dictates the compensation obligations of the carriers even after the enactment of the Act. In *WorldCom*, the D.C. Circuit explained that section 251(g) authorized only the “continued enforcement” of pre-Act requirements, namely those traffic exchange compensation arrangements (such as access) that existed as of February 8, 1996. *Id.* The D.C. Circuit also concluded that “there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.” *Id.* at 433 (emphasis in original). The Ninth Circuit has recognized that as a direct consequence of this holding, the compensation obligation arising under section 251(g) cannot apply to ISP-bound traffic. *Pacific Bell v. Pac-West Telecomm., Inc.*, 325 F.3d 1114, 1131 (9th Cir. 2003) (noting that the D.C. Circuit’s *WorldCom* decision “defeats” the argument that ISP-bound traffic may be excluded from the section 251(b)(5) intercarrier compensation obligation pursuant to section 251(g)). In other words, Qwest’s contention that VNXX ISP-bound traffic is section 251(g) traffic is contrary to binding precedent announced by the D.C. Circuit in *WorldCom*.

## **2. *ISP Mandamus Order***

In the *ISP Mandamus Order*, the FCC repeated the D.C. Circuit’s 2002 holding, that ISP-bound traffic does “not fall within the section 251(g) carve out from section

251(b)(5) as ‘there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.’”<sup>35</sup>

### 3. The History of Section 251(g)

Qwest alleges that the calls at issue here are “long-distance calls” and therefore must be compensated under section 251(g). To prove its case, Qwest must meet the qualification criteria for intercarrier compensation set forth in section 251(g) and explained in *WorldCom*.<sup>36</sup> First, Qwest would have to demonstrate that there was a “pre-Act obligation relating to intercarrier compensation” for this traffic (the locally-dialed ISP-bound traffic routed outside the local calling area). It cannot meet this hurdle, however, because no pre-Act obligation existed for ISP-bound traffic generally. *Id.* at 433. It naturally follows then, that no pre-Act obligation could exist for a sub-set of ISP-bound traffic. As a practical matter, because CLECs did not exist “pre-Act,” they could not have served ISP customers, and could not have been subject to a pre-Act compensation obligation for this traffic.

Section 251(g) also requires that the traffic in question be exchanged between a LEC and “interexchange carriers and information service providers.” The traffic Qwest challenges is exchanged by two *local exchange* carriers, Qwest and Pac-West. Additionally, a “LEC’s services to other LECs, even if en route to an ISP, are not ‘to’

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<sup>35</sup> *ISP Mandamus Order*, ¶ 16.

<sup>36</sup> *WorldCom*, 288 F.3d at 432-34.

either an IXC or to an ISP.”<sup>37</sup> Under these facts, Qwest cannot establish that VNXX service is provided to an information service provider or an interexchange carrier, as would be required under section 251(g).

Finally, section 251(g) requires that the traffic must have been subject to “equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996.” As stated above, ISP-bound traffic between these two LECs did not exist prior to the Act. Given these facts, no evidence supports Qwest’s allegation this traffic qualifies for compensation under section 251(g).

### **C. The Pac-West/Qwest ICA.**

In May of 2002 – the same month the D.C. Court of Appeals issued its decision in *WorldCom* – Qwest prepared the ISP Amendment. Three months later, in August of 2002, Pac-West signed the ISP Amendment. Qwest signed the ISP Amendment in February of 2003. By February of 2003, Qwest and Pac-West were well aware that the D.C. Circuit had rejected the FCC’s claim that it was authorized to create a plan for ISP-bound traffic under section 251(g). The D.C. Circuit had construed narrowly the services that could fall within the framework of section 251(g). ISP-bound traffic was not, and could not be, section 251(g) traffic. When it signed the ISP Amendment, Qwest was well

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<sup>37</sup> *Id.* at 434.

aware that locally dialed ISP-bound traffic was interstate in nature, but could not be subject to the section 251(g) compensation scheme.

Industry practice and the parties' course of dealing under the ICA further support Pac-West's position that all ISP-bound traffic was subject to the ISP Amendment. The rates contained in the ISP Amendment were effective beginning June 14, 2001. Qwest notified interconnecting carriers of its position that VNXX traffic is not "local" or "ISP-bound" traffic on January 25, 2005, and first began to withhold compensation for what Qwest considered VNXX traffic at that same time. Accounting records show that Qwest paid Pac-West reciprocal compensation for all ISP-bound traffic for over three years before articulating the VNXX basis for non-payment. These facts provide strong evidence that Qwest's revised understanding of the ICA does not reflect the parties' intent at the time of contracting. *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 681 P.2d 390 (App. 1983) (contract interpretation reflected in the conduct of the parties before any controversy as to meaning arises will be enforced if reasonable).

#### **D. Conclusion.**

Once the ISP Amendment was signed by Qwest and Pac-West, the only viable dispute was whether ISP-bound traffic (including this VNXX traffic) was section 251(b)(5) traffic. If the VNXX traffic at issue in this dispute is section 251(b)(5) traffic, under the ICA and the ISP Amendment, it is compensated at an agreed upon rate of .0007. Qwest argues that VNXX traffic is interstate traffic and, thus, subject to access charges. This argument is not supported by the *ISP Mandamus Order*, the *ISP Remand Order*, or the Telecommunications Act. Furthermore, Qwest's contention that this

VNXX traffic is interstate traffic (i.e. section 251(g)) traffic is directly contradicted by the D.C. Circuit Court's holding that ISP-bound traffic cannot be section 251(g) traffic. To accept Qwest's argument, one would have to conclude that the FCC has recognized a separate sub-category of ISP-bound traffic, which was not at issue in *WorldCom*, and which existed before the Telecommunications Act. Qwest offers no FCC Order citation or case law to support this theory. In sum, ISP-bound traffic is section 251(b)(5) traffic and this VNXX traffic is ISP-bound traffic. Thus, the VNXX traffic at issue in this case is section 251(b)(5) traffic and subject to reciprocal compensation under the ISP Amendment.

#### REQUEST FOR RELIEF

WHEREFORE, Pac-West requests the following relief:

That the Commission find under the FCC's *ISP Mandamus Order* that the VNXX traffic delivered to ISPs is section 251(b)(5) traffic and subject to the compensation arrangement agreed upon by Pac-West and Qwest in their ISP Amendment.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of February 2009.

OSBORN MALEDON, P.A.

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Naomi Ewing

# EXHIBIT 1

**Internet Service Provider ("ISP") Bound Traffic Amendment  
to the Interconnection Agreement between  
Qwest Corporation and  
Pac-West Telecomm, Inc.  
for the State of Arizona**

This is an Amendment ("Amendment") to the Interconnection Agreement between Qwest Corporation ("Qwest"), formerly known as U S WEST Communications, Inc., a Colorado corporation, and Pac-West Telecomm, Inc. ("CLEC"). CLEC and Qwest shall be known jointly as the "Parties".

**RECITALS**

WHEREAS, CLEC and Qwest entered into an Interconnection Agreement ("Agreement") which was approved by the Arizona Corporation Commission ("Commission") on December 14, 1999; and

WHEREAS, The FCC issued an Order on Remand and Report and Order in CC Docket 99-68 (Inter-carrier Compensation for ISP-Bound Traffic); and

WHEREAS, the Parties wish to amend the Agreement to reflect the aforementioned Order under the terms and conditions contained herein.

WHEREAS, the Parties wish to amend the Agreement to add a Change of Law provision.

**AGREEMENT**

NOW THEREFORE, in consideration of the mutual terms, covenants and conditions contained in this Amendment and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree to the language as follows in lieu of existing contract language:

**1. Definitions**

For purposes of this Amendment the following definitions apply:

- 1.1 "Bill and Keep" is as defined in the FCC's Order on Remand and Report and Order in CC Docket 99-68 (Inter-carrier Compensation for ISP-Bound Traffic). Bill and Keep is an arrangement where neither of two (2) interconnecting networks charges the other for terminating traffic that originates on the other network. Instead, each network recovers from its own end users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network. Bill and Keep does not, however, preclude inter-carrier charges for transport of traffic between carriers' networks.

- 1.2 "Information Service" is as defined in the Telecommunications Act of 1996 and FCC Order on Remand and Report and Order in CC Docket 99-68 and includes ISP-bound traffic.
- 1.3 "Information Services Access" means the offering of access to Information Services Providers.
- 1.4 "ISP-Bound" is as described by the FCC in its Order on Remand and Report and Order (Intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68.

## **2. Exchange Service (EAS/Local) Traffic**

Pursuant to the election in Section 5 of this Amendment, the Parties agree to exchange all EAS/Local (§251(b)(5)) traffic at the state ordered reciprocal compensation rate.

## **3. ISP-Bound Traffic**

3.1 Qwest elects to exchange ISP-bound traffic at the FCC ordered rates pursuant to the FCC's Order on Remand and Report and Order (Intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68 (FCC ISP Order), effective June 14, 2001, and usage based intercarrier compensation will be applied as follows:

3.2 Compensation for presumed ISP-bound traffic exchanged pursuant to Interconnection agreements as of adoption of the FCC ISP Order, April 18, 2001:

3.2.1 Identification of ISP-Bound traffic -- Qwest will presume traffic delivered to CLEC that exceeds a 3:1 ratio of terminating (Qwest to CLEC) to originating (CLEC to Qwest) traffic is ISP-bound traffic. The Parties agree that the "3:1 ratio of terminating to originating traffic", as described in Paragraph 79 of the FCC ISP Order, will be implemented with no modifications.

3.2.2 Growth Ceilings for ISP-Bound Traffic -- Intercarrier compensation for ISP-bound traffic originated by Qwest end users and terminated by CLEC will be subject to growth ceilings. ISP-bound MOUs exceeding the growth ceiling will be subject to Bill and Keep compensation.

3.2.2.1 For the year 2001, CLEC may receive compensation, pursuant to a particular Interconnection Agreement for ISP bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP bound minutes for which CLEC was entitled to compensation under that Agreement during the first quarter of 2001, plus a ten percent (10%) growth factor.

3.2.2.2 For 2002, CLEC may receive compensation; pursuant to a particular Interconnection Agreement, for ISP bound minutes up to a ceiling equal to the minutes for which it was entitled to compensation under that Agreement in 2001, plus another ten percent (10%) growth factor.

3.2.2.3 In 2003, CLEC may receive compensation, pursuant to a particular Interconnection Agreement, for ISP bound minutes up to a ceiling

equal to the 2002 ceiling applicable to that Agreement.

3.2.3 Rate Caps -- Intercarrier compensation for ISP-bound traffic exchanged between Qwest and CLEC will be billed in accordance with their existing Agreement or as follows, whichever rate is lower:

3.2.3.1 \$.0015 per MOU for six (6) months from June 14, 2001 through December 13, 2001.

3.2.3.2 \$.001 per MOU for eighteen (18) months from December 14, 2001 through June 13, 2003.

3.2.3.3 \$.0007 per MOU from June 14, 2003 until thirty six (36) months after the effective date or until further FCC action on intercarrier compensation, whichever is later.

3.2.3.4 Compensation for ISP bound traffic in Interconnection configurations not exchanging traffic pursuant to Interconnection agreements prior to adoption of the FCC ISP Order on April 18, 2001 will be on a Bill and Keep basis until further FCC action on Intercarrier compensation. This includes carrier expansion into a market it previously had not served.

#### 4. Effective Date

This Amendment shall be deemed effective upon approval by the Commission; however, Qwest will adopt the rate-affecting provisions for both ISP bound traffic and (§251(b)(5)) of the Order as of June 14, 2001, the effective date of the Order.

#### 5. Rate Election

The reciprocal compensation rate elected for (§251(b)(5)) traffic is (elect and sign one):

Current rate for voice traffic in the existing Interconnection Agreement:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name Printed/Typed

OR

The rate applied to ISP traffic:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name Printed/Typed

## **6. Change of Law**

The provisions in this Agreement are based, in large part, on the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof (the Existing Rules). Among the Existing Rules are the results of arbitrated decisions by the Commission which are currently being challenged by Qwest or CLEC. Among the Existing Rules are certain FCC rules and orders that are the subject of, or affected by, the opinion issued by the Supreme Court of the United States in *AT&T Corp., et al. v. Iowa Utilities Board, et al.* on January 25, 1999. Many of the Existing Rules, including rules concerning which network elements are subject to unbundling requirements, may be changed or modified during legal proceedings that follow the Supreme Court opinion. Among the Existing Rules are the FCC's orders regarding BOCs' applications under Section 271 of the Act. Qwest is basing the offerings in this Agreement on the Existing Rules, including the FCC's orders on BOC 271 applications. Nothing in this Agreement shall be deemed an admission by Qwest concerning the interpretation or effect of the Existing Rules or an admission by Qwest that the Existing Rules should not be vacated, dismissed, stayed or modified. Nothing in this Agreement shall preclude or estop Qwest or CLEC from taking any position in any forum concerning the proper interpretation or effect of the Existing Rules or concerning whether the Existing Rules should be changed, dismissed, stayed or modified. To the extent that the Existing Rules are changed, vacated, dismissed, stayed or modified, then this Agreement and all contracts adopting all or part of this Agreement shall be amended to reflect such modification or change of the Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement. It is expressly understood that this Agreement will be corrected to reflect the outcome of generic proceedings by the Commission for pricing, service standards, or other matters covered by this Agreement. This Section shall be considered part of the rates, terms and conditions of each Interconnection, service and network element arrangement contained in this Agreement, and this Section shall be considered legitimately related to the purchase of each Interconnection, service and network element arrangement contained in this Agreement.

## **7. Further Amendments**

Except as modified herein, the provisions of the Agreement shall remain in full force and effect. Neither the Agreement nor this Amendment may be further amended or altered except by written instrument executed by an authorized representative of both Parties. This Amendment shall constitute the entire Agreement between the Parties, and supercedes all previous Agreements and Amendments entered into between the Parties with respect to the subject matter of this Amendment.

The Parties understand and agree that this Amendment will be filed with the Commission for approval. In the event the Commission rejects any portion of this Amendment, renders it inoperable or creates an ambiguity that requires further amendment, the Parties agree to meet and negotiate in good faith to arrive at a mutually acceptable modification.

The Parties intending to be legally bound have executed this Amendment as of the dates set forth below, in multiple counterparts, each of which is deemed an original, but all of which shall constitute one and the same instrument.

Pac-West Telecomm, Inc.

  
Signature

John Sumpter  
Name Printed/Typed

Vice President, Regulatory  
Title

8/12/2002  
Date

Qwest Corporation

  
Signature

L. T. Christensen  
Name Printed/Typed

Director - Business Policy  
Title

2/6/03  
Date



# EXHIBIT 2

**ALL TELECOMMUNICATIONS TRAFFIC**

